Supreme Court, U.S.
FILED

MAR 17 2004

OFFICE OF THE CLERK

No. 03-031330

IN THE

Supreme Court of the United States

"K" LINE AMERICA, INC.,
Petitioner,

v.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the Ninth Circuit exercising diversity jurisdiction in a suit involving private interests must follow clear California insurance policy interpretation rules or may satisfy *Erie* by paying lip service to California law while actually applying unspoken, contrary principles.

STATEMENT PURSUANT TO RULE 29.6

Petitioner "K" Line America, Inc. states that "K" Line America, Inc. is a corporation duly organized and existing under the laws of the State of Michigan, that it is a wholly-owned subsidiary of a Japanese Corporation, Kawasaki Kisen Kaisha, Ltd., and that no other publicly held company owns ten percent (10%) or more of "K" Line America, Inc.

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IN THE

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No. 03-___

"K" LINE AMERICA, INC.,
Petitioner,

v.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the District Court (per Taylor, D.J.) granting respondent's motion for summary judgment and denying petitioner's motion for partial summary judgment (Appendix ("Pet. App.") 15a-21a) is not otherwise published. The District Court's judgment (per Taylor, D.J.) granting respondent's com-plaint for declaratory relief and denying petitioner's counter-claim (Pet. App. 13a-14a) is not otherwise published. The Court of Appeals' order and memorandum (per Rymer, C.J., Tallman, C.J., and Leighton, D.J.)

affirming the District Court judgment (Pet. App. 3a-6a) is not otherwise published. The Court of Appeals' order (per Rymer, C.J., Tallman, C.J. and Leighton, D.J.) denying petitioner's petition for rehearing and petition for rehearing *en banc* (Pet. App. 2a) is not otherwise published. The Court of Appeals' order denying petitioner's motion to stay the mandate (Pet. App. 1a) is not otherwise published.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order on October 31, 2003, and denied rehearing and rehearing *en banc* on December 19, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

There are no statutory provisions involved.

STATEMENT OF THE CASE

This diversity case required the Ninth Circuit to interpret an insurance policy issued by respondent to determine whether petitioner was covered for a claim made during one policy period involving a negligent act in an earlier policy period. California law applied, and California insurance policy interpretation rules pointed unerringly to a finding of coverage. The Ninth Circuit made a gesture toward California law, but affirmed a District Court finding of no coverage that was obviously based on an evaluation of the equities between the parties, not the insurance policy language. In so doing, the Ninth Circuit failed to follow the rule of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), that federal courts deciding diversity cases involving private interests must apply state law. Understanding of the Ninth Circuit's violation of *Erie Railroad Co. v. Tompkins* requires an understanding of this case and how the Ninth Circuit dealt with it in accord with its own instincts, not California law.

This case involved an insurance claim by petitioner which arose from acts in the course of its duties as North American general agent for its parent. The parent is a cargo vessel operator based in Japan, for whom petitioner markets and manages the delivery of international transportation services. Having purchased insurance from respondent insurer for some years previously, in 1991 petitioner purchased a policy on a new form [1] from respondent insurer. Respondent issued the new policy effective January 1, 1992, covering liability for errors and omissions, including claims against petitioner by its parent.

The policy was extended, then renewed by annual one-page renewal certificates, from January 1, 1993 through the year 1998. Only the 1992 policy document was issued. The policy contained two coverage provisions: the first covered claims made in the same policy period as the negligent act; the second covered claims made in a policy period after the negligent act occurred. This clause excluded coverage if the insured "could have reasonabl[y] foreseen [the claim] at the time this policy took effect." Whether this clause referred to January 1, 1992, or to every renewal date is the heart of the case. The policy had a clause requiring notice of claims and suits, but not potential claims. The policy lacked any of the insurance industry's customary clauses in such "claims made" policies providing for saving or extending coverage by notice of potential claims.

In 1996, a Taiwanese shipper complained to the parent that petitioner had delivered cargo to the shipper's customer in California without the shipper's permission. The parent advised petitioner in 1996 of this dispute and inquired whether petitioner had insurance in the event of a loss. Petitioner did

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[1] Respondent had discontinued the "excess" policy form it had been issuing to petitioner.

not respond. Petitioner did not advise respondent of this potential claim in 1996 or 1997, while the dispute was being litigated.

Beginning in late 1996, the dispute was the subject of litigation between the parent and the Taiwan shipper in both Taiwan and California. The parent's California fraud suit against the shipper was dismissed by the U.S. District Court for the Central District of California for *forum non conveniens* in an unreported decision. In 1998, the parent lost the Taiwan case (also an unreported decision), paying the shipper $1.4 million. The parent then claimed (in 1998) the $1.4 million from petitioner and demanded arbitration, which was settled ultimately for $700,000.00. An unrelated insurance policy covered the first $500,000 of the loss, while respondent's policy carried a $500,000 deductible.

Upon receiving the parent's claim in 1998, petitioner gave respondent notice of the claim and, after settling the arbitration, ultimately claimed against respondent for $348,000, including legal fees. In response to the initial notice of claim, respondent had sought a declaration of no coverage under diversity jurisdiction from the U.S. District Court for the Central District of California, which was stayed until the parent's claim was resolved.

Respondent denied coverage because the alleged negligence occurred in the 1996 policy period, the claim was not made until 1998, and petitioner foresaw the claim at the beginning of the 1998 period. Respondent argued the policy words "could have reasonabl[y] foreseen [a claim] at the time this policy took effect" referred not just to the date this policy took effect, but as well to each renewal date; thus, petitioner's knowledge of the potential claim for the 1996 acts at renewal on January 1, 1998 defeated coverage. Had petitioner's parent made its claim in 1996, rather than merely inquiring as to insurance coverage, respondent could not have come up with this excuse.

The District Court granted summary judgment for respondent because it found the words "could have reasonabl[y] foreseen . . . at the time this policy took effect" in the 1992 policy referred, unambiguously, not only to the effective date of that policy, but as well to the date of each renewal. Pet. App. 19a. Had the District Court found that the words conceivably could have been limited to the policy's effective date of January 1, 1992, summary judgment for respondent on this issue would not have been possible under California insurance policy interpretation rules. That California law applied was never questioned.

The District Court's finding that the words "at the time this policy took effect" did not refer to the time the policy took effect, but unambiguously included every renewal date, was not reached from an examination of the policy language as required by California law, but was based on a reference to the California case of *A.B.S. Clothing Collection, Inc. v. Home Insurance Co.*, 34 Cal. App. 4th 1470, 41 Cal. Rptr.2d 166 (1995).[2] *A.B.S.* is one of many surety bond cases nationwide deciding the issue of whether surety bond policy limits can be cumulated in case of a loss occurring over several years.

The Ninth Circuit affirmed the finding of no coverage in an unreported decision adopting the District Court's approach of using the *A.B.S.* case to foreclose examination of the insurance policy and discussion of the disputed words' meaning. Pet. App. 3a-6a. The motivation for the result is displayed in the Ninth Circuit's extensive discussion of the policy's notice clause, which neither applies nor was ever at issue regarding coverage. Pet. App. 5a. There can be no

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[2] The District Court also cited a Louisiana case dealing with applicability of a state statute to an insurance policy, but the Ninth Circuit did not rely on that case.

doubt the Ninth Circuit concluded that petitioner should be punished for not giving notice of the potential claim, despite the absence of any such requirement in the policy, much less any link in the policy between notice and coverage.

That the issue in *A.B.S.* had nothing to do with interpretation of respondent's policy can be seen from a discussion of *A.B.S.* in the Ninth Circuit case of *Karen Kane, Inc. v. Reliance Insurance Company*, 202 F.3d 1180 (9th Cir. 2000), which began with a statement of the issue quoted from *A.B.S.*:

> 'When an employee embezzles funds from an employer over a period of years during which the employer carries insurance against employee dishonesty from the same insurer, may the employer recover up to the insurer's limit of liability for each year in which the embezzlement occurs?'

34 Cal. App. 4th at 1473, 41 Cal.Rptr.2d 166.

The *A.B.S.* court explained that this question, one of first impression in California, could be answered by determining whether coverage is based on a series of separate contracts or on a single continuous contract:

> Courts in other jurisdictions have generally held if coverage is based on a series of separate, independent contracts, then the employer is entitled to recover up to the limit of liability for each policy period in which a loss occurs. On the other hand, if there is but one continuous contract, then the employer's recovery cannot exceed the limit of liability stated in the contract . . . . 202 F.3d at 1184.

That the Ninth Circuit in the instant case glossed over its failure to follow California law with a reference to *A.B.S.* is obvious from examination of *A.B.S.* The Ninth Circuit relied on an incorrect version of a statement purportedly made in

A.B.S. The words attributed to *A.B.S.* were not the words of *A.B.S.* The words of *A.B.S.* were as follows:

> Over the years, the rule has developed 'that a renewal of a fidelity policy or bond constitutes a separate and distinct contract for the period of time covered by such renewal unless it appears to be the intention of the parties as evidenced by the provisions thereof that such policy or bond and the renewal thereof shall constitute one continuous contract.' (citations omitted).

34 Cal. App. 4th at 1476.

These are the only *A.B.S.* words resembling the Ninth Circuit's version of a sweeping statement attributed to *A.B.S.* that "a renewal constitutes a 'separate and distinct contract for the period of time covered by the renewal . . . .'" Pet. App. 6a. *A.B.S.* made no such generalization anywhere in the opinion.

Had the Ninth Circuit not relied on a modified *A.B.S.* rule, there would have been little enough credibility to its avoidance of California interpretation rules, since the making of a new "contract upon renewal" has no bearing on the meaning of the words "at the time this policy took effect" in respondent's policy. Adding this misstatement of the *A.B.S.* holding elevated the Ninth Circuit's failure to apply California law in accordance with *Erie Railroad Co. v. Tompkins* to another level.

Although it dealt only with fidelity policies, *A.B.S.* followed the correct California rules of interpretation:

> [2] The principles governing interpretation of insurance contracts are familiar and well settled. Words used in the contract are ordinarily given their common and popular meaning. Each clause of the contract must be considered with reference to every other relevant clause and the clauses construed together in order to ascertain the intent of the parties. Similarly, in construing the meaning of a specific policy provision we do not view

> the provision in isolation but in the context of other relevant policy provisions. If the policy language is clear and explicit, it governs. If, on the other hand, the provision is susceptible to two or more reasonable constructions, it must be construed in accordance with the objectively reasonable expectations of the insured. Finally, if applying the foregoing rules does not eliminate or resolve any alleged ambiguity, the ambiguity is resolved against the insurer in favor of liability under the policy. (*La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal. 4th 27, 37 [36 Cal. Rptr. 2d 100, 884 P.2d 1048].) 34 Cal. App. 4th at 1478, 1479.

Had the Ninth Circuit followed these principles, so completely set out by the California Supreme Court[3] and explained by petitioner on brief, it would have been blocked from denying petitioner the value of its bargain; the words in their ordinary meaning and in context refer to the 1992 policy inception date,[4] or at the very least are ambiguous, leading under California law to an evaluation of respondent's reasonable expectations that it would receive coverage for premiums. The Ninth Circuit did not want to follow this path, so it used *A.B.S.* to detour around the California rules.

The starkest conflict between the real *A.B.S.* and the Ninth Circuit version may be that *A.B.S.* interpreted the words "this policy" in each of the three separate fidelity policies to refer only to the terms of that one policy document, exactly as petitioner advocates here. It is a supreme irony that petitioner's position as to the meaning of the words of

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[3] *See e.g., Bank of the West v. Superior Court*, 2 Cal.4th 1254, 633 P.2d 545 (Cal. 1992). There are some variations in stating the rules, but the basic rules are plain.

[4] The words "this policy" are sprinkled liberally throughout the policy, showing they refer to that particular policy document. Pet. App. 8a-10a.

the sole policy document at issue in this case is exactly congruent with a holding in *A.B.S.*, the Ninth Circuit's only California authority!

A.B.S. noted that each separate policy document, one issued by the insurer each year, stated it was a "renewal," but this did not convince *A.B.S.* to refer back to the policy limit in the first policy. *A.B.S.* pointed out: "Each policy contained a pledge from Home that [i]n return for the payment of the premium, and subject to all the terms of *this policy*, we agree with you to provide the insurance as stated in *this policy*." (italics in original). 34 Cal. App. 4th at 1483.

A.B.S. found the words "this policy" in each policy to refer to each of the policy documents issued by the insurer in which the words appeared; hence the insured could recover the limit under each policy. Respondent issued but one policy document here. Thus, the words "this policy" must refer to the effective date of that policy document. The Ninth Circuit did not follow *A.B.S.* because it could not countenance the result, that petitioner is entitled to coverage although petitioner did not give notice until it received an actual claim.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT VIOLATED THE *ERIE RAILROAD CO. V. TOMPKINS* RULE THAT FEDERAL COURTS MUST APPLY STATE LAW TO DIVERSITY CASES INVOLVING PRIVATE INTERESTS.

The rule that federal courts must apply state substantive law when sitting in diversity cases involving no federal interest did not restrain the Ninth Circuit in this case. The Ninth Circuit's decision made only a cursory attempt to disguise its rejection of California law. The Ninth Circuit as a whole found no reason to disturb its panel's decision. Hence, it rejected petitioner's motion for rehearing *en banc*. Pet. App. 2a.

The Ninth Circuit modified the *A.B.S.* holding on which it relied, both by deleting the words limiting the holding to a "fidelity policy or bond" and by truncating it to eliminate the conditioning words regarding the intent of the parties. The Ninth Circuit ignored the interpretation rules reiterated in *A.B.S.*, and ignored the *A.B.S* interpretation of the words "this policy," which supports petitioner's case. The Ninth Circuit did all this in order to impose a singular view of the contractual relationship between insurer and insured, and to protect respondent from its own errors.

Under *Erie Railroad Co. v. Tompkins*, there is no Ninth Circuit common law under which the Ninth Circuit may evaluate the conduct of parties to an insurance contract. It is quite obvious the Ninth Circuit had a visceral feeling that the respondent insurance company had been wronged by petitioner's renewing its policy without notice of the potential claim, despite the several flaws in the policy written by respondent and in its renewal procedure, resulting in no provision for notice of potential claims. Implicit in the Ninth Circuit's decision is some general rule to the effect that an insured has an obligation to tell its insurer of potential claims to allow the insurer to refuse to renew or to increase the premium to cover the potential risk.

The Ninth Circuit's decision fits the description by Justice Brandeis in *Erie*, of the mischievous results of the *Swift v. Tyson* [5] doctrine, that federal courts in diversity cases need not apply the common law as declared by its highest court. Justice Brandeis said the implementation of a "general law" not part of the body of a state's law was "often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject." 304 U.S. at 78. Justice Brandeis observed "that learned judges have

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[5] 16 Pet. 1, 10 L. Ed. 865 (U.S. 1842)

fallen into the habit of repeating [the *Swift v. Tyson*] doctrine as a convenient mode of brushing aside the law of a State in conflict with their views." *Id.* That is precisely what the Ninth Circuit did here; it resurrected the ghost of *Swift v. Tyson* without attribution.

II. IT IS IMPORTANT IN FAIRNESS TO DIVERSITY LITIGANTS FOR THE SUPREME COURT TO MAKE CLEAR THAT FLOUTING *ERIE RAILROAD CO. V. TOMPKINS* IS IMPERMISSIBLE.

Casting aside state law in favor of what may seem to a federal court to be more enlightened jurisprudence is grossly unfair. Not only is the foreign litigant treated differently than the California citizen whose disputes are decided by California courts, but the foreign litigant is subjected to unfair legal process, as exemplified in this case. As Justice Brandeis observed in *Erie*, the *Swift v. Tyson* doctrine "rendered impossible equal protection of the law." 304 U.S. at 75.

Petitioner painstakingly briefed to the Ninth Circuit the California Supreme Court law on interpretation of insurance policies, focusing on only one issue that had been before the District Court, the meaning of the words "this policy" in respondent's policy. But the Ninth Circuit heard a different drummer, not the California Supreme Court. The Ninth Circuit was affronted by petitioner's failure to advise respondent before 1998 that there was a potential claim. *See* Pet. App. 5a. This was not respondent's basis for denying coverage and was not the Ninth Circuit's stated basis for affirming the District Court in its *de novo* review.

In the face of the policy's lack of a clear notice requirement for potential claims, respondent's lack of a procedure on renewal for such notice, and the policy's lack of

any customary clause for giving notice and extending or protecting coverage,[6] the Ninth Circuit created as a requirement that petitioner volunteer the potential for a claim or suffer loss of coverage. This left respondent free to keep the premiums it collected for seven years, during which time both the negligent act and the claim occurred. It is a result no California court would have reached.

The insidious vice of this is that the foreign litigant comes to a diversity case not knowing what law to argue, California's or the Ninth Circuit's. Had petitioner anticipated that the issue before the Ninth Circuit would not turn on California law, but on a wide-open evaluation of petitioner's conduct, petitioner would have conducted its case differently from the very beginning, giving attention to the question of the lack of notice to respondent.

On appeal, petitioner's briefs met respondent's arguments trying to paint petitioner as undeserving of coverage, but petitioner could not imagine that the legal slate was utterly clean in the Ninth Circuit. The effect of the Ninth Circuit short-circuiting the California rules was to deny petitioner a fair opportunity to conduct and argue its case, from the inception of the case before the District Court.

Unless the Supreme Court reins in the Ninth Circuit and announces that the Ninth Circuit may not make its own legal rules for diversity cases, every foreign diversity case litigant will come to California federal courts guessing at the rules which will decide its case.

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[6] Petitioner had shown such clauses were customary, and presented the Ninth Circuit with actual examples of two such clauses.

III. IT IS IMPORTANT TO THE FLOW OF COMMERCE THAT NON-CALIFORNIA BUSINESSES BE ABLE TO DEPEND ON CALIFORNIA LEGAL RULES.

In 1991, petitioner signed the policy with respondent with a potential claim exclusion which respondent's own underwriter read as applying only as of January 1, 1992. Respondent's underwriter did not understand that the policy would deny coverage if a potential claim became known to the insured in one policy year, but the claim was not made until another policy year. Petitioner read the policy the same way as did respondent's underwriter. As a result, petitioner reasonably expected that, if it made a claim in a policy period after the initial period, it would be covered so long as potential for the claim was not foreseen on January 1, 1992. The Ninth Circuit, by implementing the policy language in a manner at odds with California law, created a gap in coverage which petitioner never anticipated. Petitioner is left to bear the financial burden of this loss without insurance coverage, seriously impacting its earnings.

Erie was explicitly concerned with commercial disputes such as this one, where it pointed out that Section 34 of the Federal Judiciary Act did not apply

> to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case.

304 U.S. at 71, 72.

Petitioner conducted itself regarding the potential claim against its parent in accordance with its reasonable expecta-

tions of coverage under the policy language in return for its premiums. Respondent took the premiums, but, when faced with a claim, invented an excuse for non-coverage which California law does not support, and succeeded in winning the support of the federal courts in defeating those expectations. If business is to be conducted in California in an orderly manner, the plain rules of state law must be applied to business done in the state. The Ninth Circuit's message of *caveat emptor* to insureds is a chilling draft on expectations of treatment according to California commercial law.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 17, 2004

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Jan. 12, 2004]

No. 02-55978
D.C. No. SACV-98-749-GLT

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Plaintiff-Appellee,

v.

"K" LINE AMERICA, INC.,
Defendant-Appellant.

ORDER

Before: RYMER and TALLMAN, Circuit Judges, and LEIGHTON,* DISTRICT Judge.

Appellant's motion to stay the mandate is denied.

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*Honorable Ronald B. Leighton, United States District Judge for the Western District of Washington, sitting by designation

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Dec. 19, 2003]

No. 02-55978
D.C. No. SACV-98-749-GLT

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Plaintiff-Appellee,

v.

"K" LINE AMERICA INC.,
Defendant-Appellant.

ORDER

Before: RYMER and TALLMAN, Circuit Judges, and LEIGHTON, *District Judge.

The panel has unanimously voted to deny the petition for rehearing and petition for rehearing en banc. Judges RYMER and TALLMAN voted to deny the petition for rehearing en banc and Judge Leighton so recommends.

The full court has been advised of the petition for rehearing en banc and no Judge has requested a vote on whether to rehear the matter en banc. Fed. R. APP. P. 35.

The petition for rehearing and petition for rehearing en banc are DENIED.

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* Honorable Ronald B. Leighton, United States District Judge for the Western District of Washington, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed October 31, 2003]

No. 02-55978
CT/AG#: CV-98-00749-GLT

ST. PAUL FIRE & MARINE INSURANCE COMPANY,
Plaintiff-counter-defendant-Appellee,

v.

"K" LINE AMERICA, INC.,
Defendant-counter-claimant-Appellant.

APPEAL FROM the United States District Court for the Central District of California (Santa Ana).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California (Santa Ana) and was duly submitted.

ON CONSIDERATION WHEREOF, It is not here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Oct. 31 2003]

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Plaintiff-counter Defendant-Appellee,

v.

"K" LINE AMERICA, INC.,
Defendant-counter claimant-Appellant.

No. 02-55978
D.C. No. CV-98-00749-GLT

MEMORANDUM *

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

Argued and Submitted October 8, 2003
Pasadena, California

Before: RYMER and TALLMAN, Circuit Judges, and LEIGHTON,** District Judge.

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* This disposition is not appropriate for publication and may. not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** Honorable Ronald B. Leighton, United States District Judge for the Western District of Washington, sitting by designation.

"K" Line America, Inc. ("KAM") appeals from the district court's order granting summary judgment in favor of St. Paul Fire and Marine Insurance Company ("St. Paul"). We affirm.

I

This Court reviews an order granting summary judgment de novo. *Cort v. St. Paul Fire & Marine Ins. Cos., Inc.*, 311 F.3d 979, 982-83 (9th Cir. 2002). Because this is a diversity action, this Court applies the substantive law of California. *Id.* at 983.

II

St. Paul issued a claims-made insurance policy to KAM in 1992. St. Paul thereafter renewed the policy, usually on an annual basis. The last such renewal covered the period January 1, 1998 through January 1, 1999. The policy provides coverage for:

> claims or suits brought against the Insured during the policy period provided that the Insured had no knowledge or could not have reasonable [sic] foreseen that such negligent act, error, or omission whenever occurring could be the basis of a claim or suit, at the time this policy took effect.

The policy requires KAM to provide St. Paul with notice of any "alleged negligent act, error, or omission."

Beginning in 1995, and continuing throughout 1996 and 1997, KAM received increasingly specific information about its potential liability for alleged negligent conduct in 1995 and 1996. KAM concedes that it did not provide notice of this potential liability until 1998.

St. Paul thereafter commenced a declaratory judgment action seeking a declaration that it did not have any obligation to indemnify KAM with respect to its alleged negligence in 1995 and 1996. The district court agreed and granted St. Paul's motion for summary judgment.

Specifically, the district court concluded that each renewal created a new policy. As such, KAM did not have coverage under the 1998 renewal because KAM knew of the potential for liability arising out of its earlier conduct at the time the 1998 renewal took effect.

III

KAM contends on appeal that one policy existed from 1992 through 1998—without regard to the number of intervening renewals—and that the language "at the time this policy took effect" refers to 1992 and not 1998. From this, KAM concludes that coverage exists under the policy because it did not know in 1992—"at the time this policy took effect"—about its subsequent alleged negligence in 1995 and 1996.

The district court correctly concluded that the renewal of an existing insurance policy creates a new policy of insurance for purposes of notice and coverage. A renewal constitutes a "separate and distinct contract for the period of time covered by the renewal . . . ." *A.B.S. Clothing Collection., Inc. v. Home Ins. Co.*, 34 Cal. App. 4th 1470 (1995). At the time the 1998 renewal took effect, KAM knew about the potential liability arising out of its alleged negligence in 1995 and 1996. KAM's pre-existing knowledge of this potential liability precludes coverage under the express terms of the policy.

AFFIRMED.

APPENDIX E

STEAMSHIP AGENTS' LEGAL LIABILITY INSURANCE

INSURED:	"K" LINE AMERICA, INC. AND ALL SUBSIDIARY OR AFFILIATED COMPANIES OR OWNED AND CONTROLLED COMPANIES AS ARE NOW HEREAFTER CONSTITUTED.
LOSS PAYABLE:	ASSURED OR ORDER
TERM:	Accidents or occurrences occurring between January 1, 1992 12:01 A.M. P.S.T. and June 1, 1992 12:01 A.M. P.S.T.
LIMIT OF LIABILITY:	The limit of liability shall not exceed each accident or occurrence irrespective of the number of firms or insureds involved.
DEDUCTIBLE:	In the case of claim or claims, including legal and investigative expenses arising from a single occurrence, the sum of $500,000.00 shall first be deducted.
PREMIUM RATES:	$7,728.00 FLAT PREMIUM

INSURING AGREEMENTS

I. COVERAGE

A. To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay on account of a claim made or suit brought against the assured during the policy period for a negligent act, error or omission of the insured (or any other person

or employee for whose acts the Insured is legally liable) which occurred during the policy period and incidental to the conduct of their business as steamship agents, excluding Terminal Operations and/or line handling.

B. This policy also covers claims or suits brought against the Insured during the policy period provided that the Insured had no knowledge or could not have reasonable foreseen that such negligent act, error, or omission whenever occurring could be the basis of a claim or suit, at the time this policy took effect.

* * * *

IV. DEFENSE, SETTLEMENT, SUPPLEMENTARY PAYMENTS

With respect to such insurance as is afford, this policy, the Company shall; defend in his name and behalf any claim or suit against the insured alleging such negligent act, error, or omission and seeking damages on account thereof, even if such suit is groundless, false, or fraudulent; but the Company shall have the right to make such investigation and negotiation of any claim or suit as may be deemed expedient by the Company.

V. EXCLUSIONS

This policy does not insure losses or expenses arising out of:

1. Any dishonest, fraudulent, criminal or malicious act, libel or slander.

2. Unless directly caused by errors or omissions in the administrative, documentation, clerical or information-processing functions of the Assured in the

conduct of its business as described in I.A. above, the following are excluded:

a. injury to, sickness, disease or death of any person, or

b. damage to or destruction of any tangible property, including the loss of use thereof.

3. Fiduciary handling of freight or other monies.

CONDITIONS

1. LIMITS OF LIABILITY

The limit of liability stated in the face of this policy is applicable to each accident or occurrence and is the limit of the Company's liability for all damages incurred on account of any claim covered hereunder.

2. NOTICE OF CLAIM OR SUIT

As soon as practicable, notice must be given to the Company on insured's receiving information as to his alleged negligent act, error, or omission, with full particulars of any claim arising therefrom.

The time of surrender or the effective date and hour of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the Company shall be the equivalent of mailing. If the named insured cancels, earned premium shall be computed in accordance with the customary short rate table and procedure, subject to minimum earned premium retention. If the Company cancels, earned premium shall be computed pro rata, subject to minimum earned premium. Premium adjustment may be made either at the time cancellation is effective or as soon as practicable

after cancellation becomes affective, but payment or tender of unearned premium is not a condition of cancellation.

* * * *

10. APPLICATION

By acceptance of this policy the insured agrees that the statements in the application are his representations, that this policy is issued in reliance upon the truth of such representations, and that the policy embodies all agreements existing between himself and the Company or any of its agents relating to this insurance.

APPENDIX F

OCEAN MARINE

The St. Paul RENEWAL CERTIFICATE

RENEWAL PERIOD	TYPE OF POLICY	POLICY NO.
FROM: 01/01/98 TO 01/01/99	STEAMSHIP AGENTS LEGAL LIABILITY INSURANCE	388 FA 8329

PREPAID RENEWAL PREMIUM	CARGO	HULL	P&I	LIABILITY	EXCESS
	$	$	$	$18,000.00	$

Name and Mailing Address of Insured:

"K" LINE AMERICA, INC. AND ALL
SUBSIDIARY OR AFFILIATED COMPANIES
OR OWNED AND CONTROLLED COMPANIES
AS ARE NOW HEREAFTER CONSTITUTED

In consideration of the renewal premium the above numbered policy is renewed for the period specified, subject to the terms and conditions thereof, except as hereinafter provided:

Exceptions:

THE PREMIUM IS AMENDED TO $18,000.00

If during the policy period (prior to the issuance of this Certificate), the Company's rules were revised so as to extend or broaden the insurance afforded by said policy without additional premium, such extended or broadened insurance shall inure to the benefit of the Insured under this Renewal Certificate.

Agency Name and Address:

SEDGWICK OF CALIFORNIA, INC.
P.O. BOX 7601
SAN FRANCISCO, CA 94120-7601

[Illegible]
Authorized Representative

December 30, 1997 San Francisco, CA
Countersign Date Countersigned at

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SANTA ANA DIVISION

[Filed Apr. 26, 2002]

Case No.: 98-749-GLT (EEx)

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Plaintiff,

v.

"K" LINE AMERICA, INC.,
Defendant.

JUDGMENT (FED. R. CIV. P. 58)

The Court, having granted plaintiff's Motion for Partial Summary Judgment on November 5, 2001, and having granted plaintiff's Motion for Summary Judgment on April 4, 2002, now renders judgment as follows:

ON PLAINTIFF'S COMPLAINT FOR DECLARATORY RELIEF:

Judgment for plaintiff. The Court declares that there is no coverage under the St. Paul policies for the claim made against defendant by Kawasaki Kisen Kaisha, Ltd. in 1998.

ON DEFENDANT'S COUNTERCLAIM:

Judgment for plaintiff. Defendant shall take nothing by way of its counterclaim.

Pursuant to Fed. R. Civ. P. 54(d), costs in $_____ (to be entered by the Clerk upon presentation of a Bill of Costs in accordance with Local Civil Rule 16) are awarded to plaintiff, as the prevailing party.

Dated: April 25, 2002.

/s/ Hon. Gary L. Taylor
HON. GARY L. TAYLOR
United States District Court Judge

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

[Filed Apr. 4, 2002]

Case No. SA CV 98-749-GLT(MLGx)

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Plaintiff,

vs.

"K" LINE AMERICA, INC.,

Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The Court GRANTS Plaintiff's Motion for Summary Judgment and DENIES Defendant's Cross-Motion for Partial Summary Judgment.

I. *BACKGROUND*

Plaintiff, an insurance provider, alleges Defendant "K" Line America, Inc. (KAM) is not covered under Plaintiff's claims-made errors and omissions policy for claims made by KAM's parent, Kawasaki Kisen Kaisha, Ltd. (Triple K). KAM, an exclusive representative of Triple K's steamship carriers, filed a counterclaim for breach of contract, bad faith,

and unconscionable contracting,[1] contending Plaintiff's insurance policies cover the claim and Plaintiff's maintains foreseeable bases for claims were not limited to likely claims, but included possible bases for claims. Plaintiff brings this Motion for Summary Judgment of its declaratory relief claim and of KAM's bad faith counterclaim. KAM brings a Cross-Motion for Partial Summary Judgment to find the policy language ambiguous.

II. *DISCUSSION*

A. *Summary Judgment Standard*

Summary judgment is proper if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The moving party in a summary judgment motion bears the initial burden of proving the absence of a genuine issue of material fact. *See Celotex Coro. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party makes this initial showing, the burden shifts to the nonmoving party to "designate specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (citation omitted). In other words, the non-moving party must produce evidence that could cause reasonable jurors to disagree as to whether the facts claimed by the moving party are true.

In making a summary judgment determination, the Court must view the evidence presented in the light most favorable to the non-moving party, drawing "all justifiable inferences

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[1] On November 5, 2001, this Court granted plaintiff's Summary Judgment Motion concerning the unconscionability claims.

. . . in his favor." *Anderson*, 477 U.S. at 255. If the non-moving party fails to present a genuine issue of material fact, the Court must grant summary judgment. *Celotex*, 477 U.S. at 323-24.

B. *Policy Language*

The policy language is unambiguous. The policy provides:

> This policy also covers claims or suits brought against the Insured during the policy period provided that the Insured had no knowledge or could not have reasonable [sic] foreseen that such negligent act, error or omission whenever occurring could be the basis of a claim or suit, at the time this policy took effect.

KAM contends this provision includes two ambiguities. First, KAM contends acts or omissions are reasonably foreseen as bases for claims only if a party is likely to bring the claim. Second, KAM claims the phrase "the time this policy took effect° refers to the policy initiation date in 1992 and not the 1998 policy renewal date.

1. *Acts or Omissions Included by the Policy*

KAM claims the "reasonably foreseen" basis of a claim only applies if the claim was likely to be made. The policy identifies acts or omissions which "could be the basis of a claim or suit" as relevant.[2] This phrase's plain language is not limited to acts or omissions likely to be the bases of a successful claim as KAM contends.[3] *See e.g., Coregis Ins.*,

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[2] Plaintiff maintains this interpretation is also supported because the Plaintiff, as the insurer, is responsible to assess the merit of the potential claims.

[3] KAM relies on unpersuasive cases to support its contention. Most of these cases address whether sufficient evidence supported the foreseeablity of the claim. Another case involves different policy language, which specifically limits foreseeability to expected claims. *See Shaheen, Cappiello, Stein & Gordon v. Home Ins., Co.*, 719 A.2d 562 (N.H. 1998) (interpreting legal malpractice insurance language in an insuring clause

Co. v. Camieo Mut. Ins., Co., 959 F.Supp 1213 (C.D. Cal. 1997) (finding inconceivable insured's contention it did not foresee its acts could be the bases for a claim when it was under scrutiny in a pending lawsuit between other parties); *Phoenix Ins., Co. v. Sukut Constr., Co.*, 136 Cal. App.3d 673 (1982) (explaining insurance policy language "might be expected to be the basis of a claim" is unambiguous and includes all bases regardless of their likelihood to become claims); *International Surplus Lines Ins., Co v. Mfr. & Merch. Mut. Ins., Co.*, 661 A.2d 1192 (N.H. 1995) (finding the policy language, "act error or omission might be the basis for a claim. . ." unambiguous and determining the likelihood or actuality of the claim was irrelevant). The policy language at issue includes known or foreseeable bases of a claim regardless of a third party's likelihood to bring or succeed upon an actual claim.

Here, KAM knew or could have reasonably foreseen its release of the bicycles without receipt of the bill of lading could have been the basis of a claim against it. In 1996, KAM was told by Triple K the Client complained about KAM's release of the bicycles. KAM's Vice-President of Operations testified he knew the Client was complaining about the bicycles' release and KAM should not have released the bicycles. The Vice-President also indicated he was aware this bicycle problem may present a claim for KAM. KAM's in-house counsel, Meade, also was concerned the Client would bring claims against KAM or Triple K and Triple K might sue KAM for indemnity. Triple K sent KAM several written notices indicating KAM did not follow the written policies and KAM's mistake could cause damages for Triple K. Triple K also asked KAM whether its insurance covered the mistake. Meade served as Triple K's co-counsel in its suit with the Client concerning the bicycles.

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provision and not addressing the notice condition or application sections' language).

When Triple K lost against the Client in Taiwan, KAM's potential claim risk increased, but it did not notify Plaintiff. Meade's suggestion an indemnity claim by Triple K against KAM could secure this Court to hear the same issues decided in Taiwan shows KAM was aware the bicycles' release could be the basis of a claim. Meade notified KAM's President of this possibility. KAM had to have been aware its bicycle mistake could be the basis of a claim against it by the Client or Triple K. In 1997, KAM told its other insurer, ITIC, it was aware of circumstances "which may give rise to a claim" against KAM and specifically identified the Client's bicycles. No genuine issues of fact exist concerning KAM's knowledge before 1998 that the bicycles' release could be a basis for a claim against it.

2. *Effective Policy Date*

KAM contends the phrase "at the time this policy took effect" 'refers to the date a policy was first established between the parties in 1992. The language referring to when "this policy took effect" means the 1998 renewal date. KAM's interpretation of the effective policy date is implausible. The 1998 renewal created a new policy. The renewed 1998 policy is a separate contract, independent of the 1992 policy and its provisions. *See e.g., ABS Clothing Collection, Inc. v. Home Ins., Co.*, 34 Cal. App.4th 1470 (1995) (holding one "continuous" insurance contract exists only if there is clear and unambiguous language showing the parties intended to enter into one continuous contract); *Roy v. Audobon Ins. Co.*, 652 So.2d 995 (La. App. 1993) (identifying renewed insurance policy as a separate contract and finding the change in state law after the original policy date, but before the renewal date, impacted claims under the renewed policy).

In two instances, the parties entered endorsements which expressly "extended" the original 1992 policy. *See* 1992 & 1996 Endorsements. However, in all other instances, including 1998, KAM requested and agreed to renewal certificates

which renewed the policy. The parties recognized the distinction between extensions and renewals by the type of contract they entered and the contract language. KAM's strained interpretation of the policy does not create ambiguity. The policy language refers to bases for claims at the time the policy took effect in 1998.

Plaintiff properly denied KAM's claim regarding the release of the bicycles because Plaintiff knew about the basis for the claim before the policy became effective in 1998. Plaintiff's Motion for Summary Judgement is GRANTED. KAM's Cross-Motion for Partial Summary Judgment is DENIED.

C. *KAM's Bad Faith Cross-Claim*

KAM counterclaims Plaintiff acted in bad faith. A bad faith claim should be dismissed on summary judgment if the insurer shows there was a genuine dispute concerning coverage, which defeats a bad faith claim. *See Guebara v. Allstate Ins. Co.*, 237 F.3d 987, 992 (9th Cir. 2001). Also, If an insurer properly denies coverage, a bad faith claim fails as a matter of law. *See Waller v. Truck Ins. Exch.*, 11 Cal.4th 1, 36 (1995). The parties' disagreement whether the Triple K claim is covered by the 1998 insurance policy shows a bad faith claim is improper because the parties genuinely dispute insurance coverage. Also, KAM's bad faith claim is inappropriate because Plaintiff correctly denied coverage.

Plaintiff's Motion for Summary Judgement of KAM's bad faith Cross-Claim is GRANTED.[4]

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[4] KAM's reliance on *Gen'l Ins., Co. v. Rhoades* is unpersuasive. *See* 196 F.R.D. 620 (D.N.M. 2000) (denying summary judgment because the evidence did not support defendant's awareness of a potential claim and finding the exclusion clause provision ambiguous because its impact was unfair). That court's interpretation of an exclusion provision under New Mexico law is not applicable here where the policy language at issue is not part of an exclusion provision and California law controls. In

DATED: April 4, 2002.

/s/ Gary Taylor
GARY TAYLOR
UNITED STATES DISTRICT COURT JUDGE

Rhoades, the Court rationalized the unconscionable result created ambiguous language, requiring the court to consider the insured's reasonable expectations. California law provides a separate statute to address unconscionable contracts and this Court found the parties' agreement was not unconscionable in November 2001. To determine ambiguity, the Court first looks at the contract language. If the language is unclear and ambiguous, this Court then may consider the insured's reasonable expectations. Here, the Court finds the policy language is clear, unambiguous, and enforceable.